IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

ILLINOIS RESTAURANT ASSOCIATION, *et al.*,	)	
Plaintiffs,	)	Case No. 06 CH 17120
v.	)	Judge Mary Anne Mason
CITY OF CHICAGO, a municipal corporation,	)	
Defendant.	)	

NOTICE OF FILING

TO: Counsel on Attached Certificate of Service

PLEASE TAKE NOTICE that on November 3, 2006, counsel for Defendant the City of Chicago filed with the Clerk of the Circuit Court of Cook County **Defendant's Motion to Dismiss**, together with **Defendant's Memorandum in Support of Defendant's Motion to Dismiss**, copies of which are hereby served upon you.

Dated: November 3, 2006

Respectfully submitted,

Mara S. Georges
Corporation Counsel, City of Chicago

By: [signature]
An Attorney for the City

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CERTIFICATE OF SERVICE

I, David A. Grossman, an attorney, certify that on November 3, 2006, I caused copies of the foregoing Notice of Filing, Defendant's Motion to Dismiss, and Defendant's Memorandum in Support of Defendant's Motion to Dismiss, to be served upon the following persons by hand-delivery using a messenger service:

Barry S. Rosen
Michael D. Richman
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David A. Grossman

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DEFENDANT'S MOTION TO DISMISS

Defendant the City of Chicago ("the City"), by its attorney Mara S. Georges, Corporation Counsel of the City of Chicago, respectfully moves to dismiss plaintiffs' complaint for failure to state a claim upon which relief can be granted, pursuant to 735 ILCS 5/2-615. For the reasons set forth in the accompanying Memorandum In Support of Defendant's Motion To Dismiss, which is filed herewith and incorporated as if set forth in full herein, the City respectfully requests that this Honorable Court grant its motion to dismiss and dismiss plaintiffs' complaint with prejudice.

Dated: November 3, 2006

Respectfully submitted,

Mara S. Georges
Corporation Counsel, City of Chicago

By: David A. Grossman
An Attorney for the City

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MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

Plaintiffs Illinois Restaurant Association and A.N.A.C., d/b/a Allen's New American Café filed this lawsuit to challenge the constitutionality of a City of Chicago ("the City") ordinance prohibiting the sale of foie gras by specified institutions operating within the City. Although plaintiffs contend that the City exceeded its authority as a home rule unit of government under the Illinois Constitution when it passed the ordinance, their argument relies upon an erroneous conception of the City's authority as a home rule unit of government. Contrary to plaintiffs' view, the City was operating well within its authority under the Illinois Constitution when it enacted the ordinance. Accordingly, plaintiffs fail to state a claim upon which relief can be granted, and the City respectfully requests that the Court grant its motion to dismiss.

BACKGROUND

The City Council passed Ordinance PO-05-1895, the foie gras ordinance ("the Ordinance"), on April 26, 2006, and published it on the City's website on May 26, 2006. Compl.

¶¶ 30, 35 & Ex. A. Because the Ordinance provides that "[t]his ordinance shall be in full force and effect ninety (90) days after its passage and publication," *id.* Ex. A., the Ordinance became effective on August 23, 2006. *Id.* ¶ 36.

The Ordinance amends the City's Municipal Code to prohibit the sale of foie gras at "food dispensing establishments" within the City. *Id.* ¶ 31 & Ex. A; Mun. Code of the City of Chicago § 7-39-001. A "food dispensing establishment" is "[a]ny fixed location where food or drink is routinely prepared and served or provided for the public for consumption on or off the premises with or without charges." Mun. Code of the City of Chicago, § 4-8-010. Restaurants are one type of a food dispensing establishment. *Id.* Any business that violates the prohibition against the sale of foie gras is subject to a fine of between $250 and $500 for each offense. *Id.* § 7-39-005.

In passing the Ordinance, the City Council recognized that the City "is home to many famous restaurants offering the finest cuisine and dining experiences to their customers," and that "[m]illions of people visit Chicago every year, attending cultural events and dining in our legendary restaurants." Compl. Ex. A. The City Council also expressed its view that "[t]he people of Chicago and those who visit here have come to expect, and rightfully deserve, the highest quality in resources, service and fare." *Id.*

Alongside this attention to the City's "legendary restaurants," the City Council noted recent media spotlights "on the unethical practices of the care and preparation of the livers of birds." *Id.* The City Council specifically focused upon the practice during which "[b]irds, in particular geese and ducks, are inhumanely force fed, via a pipe inserted through their throats several times a day, in order to produce a rare delicacy, foie gras, for restaurant patrons." *Id.*

After recognizing the importance of restaurants for the City and identifying the "unethical practices" that are used to produce foie gras, the City Council observed that the State of California recently enacted legislation addressing the production and sale of foie gras and that similar legislation is pending before the State of Illinois. *Id.* Moreover, the City Council observed that a recent survey showed that nearly 80 percent of Americans oppose the treatment of geese and ducks whose livers become foie gras. *Id.* The City Council then determined that "[b]y ensuring the ethical treatment of animals, who are the source of the food offered in our restaurants, the City of Chicago is able to continue to offer the best in dining experiences." *Id.*

In light of all of these considerations – the status and importance of restaurants within the City; the "unethical"and "inhumane[]" act of force-feeding geese and ducks to produce foie gras; the existence of legislation addressing foie gras production and sale in other jurisdictions; the widespread opposition among Americans to the foie gras production process; and the connection between and among the ethical treatment of animals, the food served in the City's restaurants, and the City's interest in "offer[ing] the best in dining experiences" at the City's restaurants – the City acted pursuant to its home rule power under the 1970 Illinois Constitution and passed the Ordinance.

On August 25, 2006, plaintiffs filed this lawsuit for declaratory and injunctive relief, alleging that the Ordinance is "an unconstitutional exercise of Chicago's home rule powers." Compl. ¶ 54; *see also id.* ¶ 56. Plaintiffs request, among other things, that the Court enter a declaratory judgment declaring the Ordinance unconstitutional and void and provide injunctive relief to prevent the City from enforcing the Ordinance. *Id.* ¶ 19 & at 11.

ARGUMENT

I. Standard of Review.

"The question presented by a section 2-615 motion to dismiss is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Abbasi v. Paraskevoulakos*, 187 Ill.2d 386, 391 (1999). Because a section 2-615 motion to dismiss "challenges only the legal sufficiency of the complaint," the court must accept as true "[a]ll well-pleaded facts in the complaint." *Jarvis v. South Oak Dodge, Inc.*, 201 Ill.2d 81, 85-86 (2002). However, "conclusions of law will not be taken as true, unless supported by specific factual allegations." *Id.* at 86.

II. The Ordinance is Constitutional.

The City Council passed the Ordinance to prohibit the sale of foie gras in restaurants and other food-dispensing establishments within the City. That is the Ordinance's sole regulatory object. By banning the sale of foie gras in such establishments, the City passed an Ordinance that its elected representatives believed would, among other things, enhance the reputation and image of the City and its restaurants and advance the morals of the community. Any effect on the treatment of ducks or geese located outside of the City is an indirect result of the Ordinance's operations, because the only behavior that the Ordinance directly regulates is the sale of foie gras occurring entirely within the City's borders.

Plaintiffs nevertheless allege that the Ordinance is unconstitutional because it does not pertain to local issues and concerns and instead seeks to regulate behavior and activities that occur outside of the City. Compl. ¶¶ 14-18, 45, 51, 53-54. However, as the following discussion of the City's home rule authority establishes, the City was well within its authority when it

passed the Ordinance.

A. Home Rule Units of Government Have Broad Legislative Authority.

The Illinois Constitution of 1970 provides that "a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt." Ill. Const. 1970 art. VII, § 6(a). Because the City "is a home rule unit of local government under the 1970 Illinois Constitution," *City of Chicago v. Roman*, 184 Ill.2d 504, 512 (1998), section 6(a) defines the scope of the City's legislative authority.

The Supreme Court of Illinois has repeatedly emphasized the expansive nature of a home rule unit's powers. *Schillerstrom Homes, Inc. v. City of Naperville*, 198 Ill.2d 281, 287 (2001) ("Section 6(a) confers 'the broadest powers possible.'") (quoting *Scadron v. City of Des Plaines*, 153 Ill.2d 164, 174 (1992)); *Roman*, 184 Ill.2d at 512 ("Section 6(a) gives home rule units the broadest powers possible."); *City of Carbondale v. Yehling*, 96 Ill.2d 495, 497 (1983) (observing that "[h]ome rule unites were granted broad powers of self-government"); *City of Evanston v. Create, Inc.*, 85 Ill.2d 101, 107-08 (1981). The extent of these powers "is broad and imprecise in order to allow for great flexibility." *City of Evanston*, 85 Ill.2d at 107. Consistent with that purpose, a home rule unit's powers and functions "shall be construed liberally." Ill. Const. 1970 art. VII, § 6(m).

Moreover, as an additional indication of the extent of a home rule unit's powers, the Illinois Constitution provides that home rule units and the State have concurrent authority absent a specific limitation on the home rule unit's authority or a specific declaration that the State's authority is exclusive. *Id.* art. VII, § 6(i). Accordingly, "home rule units have the same powers

as the sovereign, except where such powers are limited by the General Assembly." *Roman*, 184 Ill.2d at 512 (quoting *Triple A Svcs., Inc. v. Rice*, 131 Ill.2d 217, 230 (1989)); *see also Johnson v. Halloran*, 194 Ill.2d 493, 496 (2000) ("In Illinois, sovereign power is not restricted to the state government. It may also be exercised by home rule units.") (citing Ill. Const. 1970 art. VII, § 6(i)).

A home rule municipality, like the State, therefore "has broad discretion to determine not only what the public interest and welfare require, but to determine the measures needed to secure such interest." *Chicago Nat'l League Ball Club, Inc. v. Thompson*, 108 Ill.2d 357, 364 (1985); *see also Village of Glenview v. Ramaker*, 282 Ill. App. 3d 368, 371 (1st Dist. 1996) (same). As a result, courts do not evaluate the wisdom or desirability of those determinations when plaintiffs challenge an ordinance. *Village of Glenview*, 282 Ill. App. 3d at 371 ("Courts will not disturb an exercise of police power merely because there is room for a difference of opinion about the wisdom or necessity of its exercise.").

B. The City Council Acted Within Its Authority When It Passed the Ordinance.

A three-part test exists "for evaluating the constitutionality of exercise of home rule power." *Schillerstrom Homes, Inc. v. City of Naperville*, 198 Ill.2d 281, 289 (2001). The first inquiry asks "whether the local government's activity is a function pertaining to its government and affairs." *Id.* Assuming an affirmative answer to the first question, the second consideration is "whether the General Assembly has preempted the use of home rule powers in this area." *Id.* Finally, if no preemption has occurred, the court "must determine the 'proper relationship' between the local ordinance and the state statute." *Id.* at 289-90 (quoting *County of Cook v. John Sexton Contractors Co.*, 75 Ill.2d 494, 508 (1979)).

Plaintiffs do not allege that the General Assembly has preempted the City's ability to enact ordinances regulating the products that may be sold in City restaurants. Nor do they suggest that any statute negatively affects the Ordinance's legality. Rather, plaintiffs attack the constitutionality of the Ordinance on the grounds that it does not pertain to local concerns and has an impermissible extraterritorial effect. Compl. ¶¶ 14-18, 45, 51, 53-54.

Plaintiffs contend that the Ordinance is unconstitutional because its actual purpose is to ensure the ethical treatment of animals, yet those animals are not located in the City. *Id.* ¶¶ 40-44. Accordingly, in plaintiffs' view, the Ordinance does not address a local problem or concern. But contrary to plaintiffs' argument, the regulation of the sale of foie gras in the City does pertain to local government and affairs.

"An ordinance pertains to the government and affairs of a home rule unit where the ordinance relates to problems that are local in nature rather than State or national." *Village of Bolingbrook v. Citizens Util. Co.*, 158 Ill.2d 133, 138 (1994). However, problems can be local concerns even if they are also issues at the state or national level. *Scadron v. City of Des Plaines*, 153 Ill.2d 164, 1158 (1992) ("Simply because the proliferation of billboards may be a national and State problem, it does not then immediately follow that the problems posed by billboard advertising is of no concern to home rule municipalities."); *City of Evanston v. Create, Inc.*, 85 Ill.2d 101, 113 (1981) ("The mere existence of State interest and activity in a particular field does not alone preclude home rule activity, absent legislative action to limit or exclude home rule power or to declare it one of exclusive State controls."). The key question, therefore, is whether the Ordinance pertains to issues that concern the City.

Three factors are generally considered in determining whether an ordinance addresses

statewide as opposed to local problems: "[1] the nature and extent of the problem, [2] the units of government which have the most vital interest in its solution, and [3] the role traditionally played by local and statewide authorities in dealing with it." *Kalodimos v. Village of Morton Grove*, 103 Ill.2d 483, 501 (1984). Inquiring into these factors is necessary because the Illinois Constitution does not provide "a specific formula or listing" for separating issues that are statewide rather than local concerns. *Id.*

This three-factor analysis cannot occur without first identifying the issues and concerns that an ordinance addresses. Here, the Ordinance prohibits restaurants and other food-dispensing establishments in the City from selling foie gras. The Ordinance's regulatory objective reveals that its primary purpose, and the concern underlying its passage, is the control of food products that are sold in the City's restaurants. More specifically, the Ordinance relates to the City's desire to maintain the character and quality of the City's restaurants – and, by extension, the City's image and reputation – as places where residents and visitors will be assured that food products resulting from the unethical treatment of animals will not be sold. The Ordinance thus reflects the City Council's judgment that banning the sale of foie gras would benefit the City and advance the morals of the community.

Although the Ordinance would not have been enacted were it not for the inhumane treatment of ducks and geese that are raised to produce foie gras, the Ordinance does not regulate that conduct. Instead, it proscribes the sale of foie gras occurring in the City because of the City Council's determination that eliminating that conduct would contribute to the City's interest and welfare. The City Council's judgment that the Ordinance would lead to positive results for the City, of course, is not the proper subject of judicial examination. *Chicago Nat'l League Ball*

Club, Inc. v. Thompson, 108 Ill.2d 357, 364 (1985) (explaining that a legislature "has broad discretion to determine not only what the public interest and welfare require, but to determine the measures needed to secure such interest"); *Village of Glenview v. Ramaker*, 282 Ill. App. 3d 368, 371 (1st Dist. 1996) ("Courts will not disturb an exercise of police power merely because there is room for a difference of opinion about the wisdom or necessity of its exercise.").

These concerns and considerations are without a doubt local in nature. As an initial matter, Illinois law specifically permits municipalities to "regulate the sale of all beverages and food for human consumption" except in certain situations not relevant here. 65 Ill. Comp. Stat. 5/11-20-2. This statute not only empowers the City to act in the field of food sale and consumption, but also establishes that the regulation of food products sold in restaurants within a municipality is an area traditionally dealt with at the local level. *See Scadron*, 153 Ill.2d at 1159 (concluding that local governments traditionally regulate outdoor advertising signs in light of, among other things, State laws "demonstrat[ing] that outdoor advertising signs are subject to municipal regulation"). Similarly, local government leaders traditionally pursue efforts to enhance the image or reputation of the municipality that they represent and to enact laws that reflect their constituents' values.

With respect to the nature and extent of the problem, the consequences of the sale of foie gras in the City's food-dispensing establishments most directly affects the City, not the State. The sale of foie gras within the City by definition does not extend beyond the City's boundaries. As a result, the specific problem that the Ordinance addresses is a local one. *Village of Bollingbrook*, 158 Ill.2d at 139-41 (holding that the village had the home rule authority to regulate public utilities' disposal of waste and sewage within the village's boundaries, and

recognizing that "if a problem is purely local in nature, it does pertain to the government and affairs of a home rule unit"); *Kalodimos*, 103 Ill.2d at 503-05 (concluding that the village's ordinance prohibiting possession of operable handguns addressed local problems, noting that the ordinance did not regulate state or regional institutions or private conduct outside of the village's boundaries); *City of Carbondale v. Yehling*, 96 Ill.2d 495, 499-500 (1983) (explaining that the city's eminent domain ordinances, which established procedures enabling the city to exercise eminent domain within the city's boundaries for the purpose of redeveloping its business district, related to local concerns); *City of Evanston v. Create, Inc.*, 85 Ill.2d 101, 113-14 (1981) (concluding that the city's landlord-tenant ordinance addressed local concerns, observing that "the local governing body can create an ordinance specifically suited for the unique needs of its residents and is keenly and uniquely aware of the needs of the community it serves").

To be sure, by prohibiting the sale of foie gras within the City, the Ordinance might conceivably reduce the national demand for foie gras and thereby impact those businesses that produce foie gras. In *Kalodimos*, however, the Illinois Supreme Court rejected a similar secondary-effects argument with respect to Morton Grove's ordinance banning the possession of all operable handguns in that municipality. *Id.*, 103 Ill.2d at 504-05. The court explained that the ordinance did not regulate conduct outside of Morton Grove, "except insofar as it may incidentally cause people who wish to carry a handgun while traveling to route themselves through other communities rather than Morton Grove." *Id.* at 504. That possibility was not "a reason to hold that weapons control does not pertain to local government and affairs." *Id.* By the same reasoning, the potential secondary effects of the City's Ordinance on foie gras producers do not transform the Ordinance into a regulation of conduct occurring outside of the City. Such a

theory, if accepted, would provide a basis for invalidating nearly any regulation of economic activities within the municipality, because commercial activities in the United States are seldom, if ever, purely local. *See Nat'l Paint & Coatings Assoc. v. City of Chicago*, 45 F.3d 1124, 1130 (7th Cir. 1995) ("Because even 'local' activities displace the movement of goods, services, funds, and people, almost every state and local law – indeed, almost every private transaction – affects interstate commerce.").

As noted previously, the Ordinance would not have been enacted if foie gras producers did not operate their farms. But the fact that the chain of events that culminates in economic activity within the City begins elsewhere does not prevent the City from acting to regulate activities within its jurisdiction. Rather, the flexibility of home rule enables the City to prohibit the sale of foie gras in City restaurants even though the City cannot regulate the production of foie gras. *Kalodimos*, 103 Ill.2d at 504-05 ("The grant of home rule powers contemplates that different communities which perceive a problem differently may adopt different measures to address the problem, provided that the legislature has taken no affirmative steps to circumscribe the measures that may be taken and that the measures taken are reasonable."). Just as the court held that Morton Grove could prohibit the possession of operable handguns within the village boundaries in *Kalodimos*, and recognized that "allowing a home rule unit to control its unique problems regarding the relationship between landlord and tenant is consistent with the role of home rule" in *City of Evanston*, 85 Ill.2d at 113, the City's powers as a home rule unit enable it to ban the sale of foie gras at its food-dispensing establishments. And the City Council's legislative judgment that doing so would enhance the City's interests and welfare is not open to questioning in court. *Chicago Nat'l League Ball Club, Inc. v. Thompson*, 108 Ill.2d 357, 364

(1985); *Village of Glenview v. Ramaker*, 282 Ill. App. 3d 368, 371 (1st Dist. 1996).

Moreover, the Ordinance's exclusive focus upon conduct occurring within the City is a particularly significant distinction from cases involving ordinances that did not pertain to a home rule unit's local government and affairs. *Cf. People ex rel. Bernardi v. City of Highland Park*, 121 Ill.2d 1, 13 (1988) ("Departure from the prevailing wage in this case is beyond the authority accorded home rule units because it directly affects matters and individuals outside the territorial boundaries of Highland Park."); *Metropolitan San. Dist. v. City of Des Plaines*, 63 Ill.2d 256, 260-62 (1976) (holding that the city lacked the authority to require a regional sewage treatment plant to apply for a city permit, because the plant was designed to "serve six other municipalities, some of which are themselves home rule units and all of which could become so"); *City of Des Plaines v. Chicago & N.W. Ry. Co.*, 65 Ill.2d 1, 5, 7 (1976) (invalidating a city ordinance that regulated noise pollution because "noise pollution is a matter requiring regional, if not statewide, standards and controls" due to the migration of noise from one municipality to the next); *Bridgman v. Korzen*, 54 Ill.2d 74, 78 (1972) (holding that county's ordinance altering the statutorily prescribed frequency with which property taxes must be paid violated home rule authority because the collection and distribution of property taxes affected other taxing bodies within the county on whose behalf the county collected taxes). Unlike these cases, the Ordinance does not regulate conduct outside of the City.

Nor does the Ordinance pertain to conduct within the City that involves an area of exclusive statewide concern, such as the administration of justice, *Ampersand, Inc. v. Finley*, 61 Ill.2d 537 (1975) (invalidating a county ordinance that required the collection of a filing fee to support a county law library, because doing so would have affected the administration of justice),

or the control of banking, *People ex rel. Lignoul v. City of Chicago*, 67 Ill.2d 480, 488 (1977) (concluding that the statewide interest in banking precluded home rule units from regulating in that field).

The preceding discussion leads directly into the final *Kalodimos* inquiry – which unit of government has the greatest interest in addressing the sale of foie gras within the City's restaurants. No demonstrable State interest exists in ensuring uniformity in the availability of foie gras in restaurants throughout the State. In contrast, the food products that are available for purchase in the City's restaurants have an immediate impact upon the City. *Cf. Village of Bolingbrook*, 158 Ill.2d at 140 (explaining that the village's residents had "been subjected to raw sewage being dumped on their property," which was the very conduct that the ordinance in question sought to prevent); *Scadron*, 153 Ill.2d at 1159-60 (concluding that the city had the most vital interest in regulating outdoor advertising signs within its borders in light of the sign regulations and the findings that accompanied them).

In sum, the Ordinance addresses the sale of food products in the City's restaurants, which is undeniably a local concern. The Ordinance does not regulate the treatment of ducks or geese, and the potential secondary effects on businesses that produce foie gras does not render the Ordinance unconstitutional. Regardless of the location of the root cause (here, the treatment of animals) of the concern that the Ordinance addresses, the Ordinance regulates conduct (here, the sale of foie gras) occurring in the City, which is a matter of local government and affairs.

The nature and extent of the concerns that the Ordinance addresses are local ones that the City has the greatest interest in regulating and that are within the traditional domain of the City's control. Accordingly, the City was well within its authority as a home rule unit when it passed

the Ordinance.

CONCLUSION

For all of the reasons set forth above, the City respectfully requests that the Court dismiss with prejudice plaintiff's complaint for failure to state a claim upon which relief can be granted.

Dated: November 3, 2006

Respectfully submitted,

Mara S. Georges
Corporation Counsel, City of Chicago

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